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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 66

ANGHEL GOLDSTEIN, a/k/a Andrei Pietraru, IULIU NASTA, a/k/a Julius Nasta and GHEORGHE FUNDI, on behalf of themselves and all others similarly situated,

Appellants,

vs.

JOSEPH A. COX and SAMUEL DiFALCO, Surrogates of the County of New York, EDWARD F. SILVER, Surrogate of the County of Kings, CHRISTOPER C. McGRATH, Surrogate of the County of Bronx, JOHN T. CLANCY, Surrogate of the County of Queens, ARTHUR LEVITT, State Comptroller,

Appellees.

BRIEF OF AMICUS CURIAE

WOLF POPPER ROSS WOLF & JONES,
By MARTIN POPPER,
845 Third Avenue,
New York, New York 10022,
Amicus Curiae.

MARTIN POPPER,
of Counsel.

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IN THE

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OCTOBER TERM, 1968

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ANGHEL GOLDSTEIN, a/k/a Andrei Pietraru, IULIU NASTA, a/k/a Julius Nasta and GHEORGHE FUNDI, on behalf of themselves and all others similarly situated,

Appellants,

vs.

JOSEPH A. COX and SAMUEL DIFALCO, Surrogates of the County of New York, EDWARD F. SILVER, Surrogate of the County of Kings, CHRISTOPHER C. MCGRATH, Surrogate of the County of Bronx, JOHN T. CLANCY, Surrogate of the County of Queens, ARTHUR LEVITT, State Comptroller,

Appellees.

BRIEF OF AMICUS CURIAE

Interest of *Amicus Curiae*

Amicus Curiae herein are attorneys-at-law, duly admitted to practice in all of the state courts of the State of New York, and three of them, including of counsel herein, are admitted to practice before the Bar of this Court.

We are the attorneys for the Chiefs of the Consular Sections of the Embassies of the Union of Soviet Socialist Republics, Czechoslovakia, Hungary, Bulgaria and for the Consul General of Poland, in connection with their representation of the interests of their nationals who are legatees and distributees in estates in the City and State of New York. We also represent the Chief of the Consular Section of the Roumanian Embassy in numerous estate matters in the City of New York and, under powers of attorney, the legal interests of hundreds of legatees and

distributees in estates in the City and State of New York who are nationals of the above-described countries and persons who are nationals of the German Democratic Republic and Albania.

The decision of this Court in this case will necessarily affect the legal interests of all of our above-described clients.

The complaint herein challenges the constitutionality, on its face and as it has been applied, of Section 2218 of the Surrogate's Court Procedure Act of the State of New York * as an invasion by the State of New York of the exclusive power of the Federal government to conduct foreign relations and as a violation of the Fourteenth Amendment.

Since 1951, petitioners have been involved in the presentation of these constitutional issues in the courts throughout the State of New York from the Surrogate's Courts to the Court of Appeals, the highest Court of the State. Petitioners first raised the issue of New York's involvement in the conduct of foreign relations before this Court in 1953. *Matter of Braier*, 305 N. Y. 148, 111 N. E. 2d 424 (1953), *appeal dismissed sub nom; Kalmanc* v. *Green*, 346 U. S. 802, 745 S. Ct. 32 (1953).

Subsequent to the decision in *Zschernig* v. *Miller*, 389 U. S. 429, 88 S. Ct. 664 we asked the Court of Appeals of the State of New York to apply the standards enunciated by this Court to Section 2218 of the Surrogate's Court Procedure Act of New York. The Court of Appeals declined to deal with the constitutional issue, although petitioners in their brief presented a comprehensive history of the manner in which the New York courts had applied Section 2218 of the Surrogate's Court Procedure Act of New York in contravention of the *Zschernig* decision. *Matter of Kina*, 23 N. Y. 2d 720, 268 N. Y. S. 2d 773. Pre-

* Hereinafter referred to as SCPA 2218.

viously, the Court of Appeals had decided that Section 2218 is constitutional on its face and that it was unable on the record then before it to find that the statute had been unconstitutionally applied. *Matter of Leikind,* 22 N. Y. 2d 346, 292 N. Y. S. 2d 681 (1968).

We represent the plaintiffs before a three-judge court of the United States District Court for the Southern District of New York in *Bjarsch* v. *DiFalco,* U. S. D. C. S. D., 68 Civ. 4216, decision pending, in which the plaintiffs are residents of the German Democratic Republic. They are challenging the constitutionality of SCPA 2218 both on its face and as applied, including subsections 1(a) and (b) of the statute which became effective in June, 1968. In the instant case the Court below quoted the entire statute as part of its decision, including subsections 1(a) and (b). The Attorney-General of New York, in his motion to dismiss the appeal herein has asserted that the constitutionality of subsections 1(a) and (b) is not involved. Since his position is at variance with the position taken by him in the oral argument of the motion before the United States District Court for the Southern District of New York requesting the convening of a three-judge court and because this Court in its order noting probable jurisdiction set forth no limitation, we are not certain whether SCPA 2218 in its entirety will be reviewed by the Court, or only sections 2 and 3 thereof.

In any event, it is our position that the arguments applicable to sections 2 and 3 are equally applicable to subsections 1(a) and (b). There are also independent reasons why, in our opinion, subsections 1(a) and (b) are unconstitutional. We have presented these to the three-judge court in the *Bjarsch* case and we would, of course, present them to this Court, if it were disposed to receive them.

We have received the consent of all the parties in this case to file this *amicus curiae* brief.

Questions on This Appeal

The questions on this appeal are whether on its face and as applied by the New York courts SCPA 2218 is an illegal intrusion by the State into the area of foreign relations and whether it violates the due process and equal protection provisions of the Fourteenth Amendment.

Statute Involved on This Appeal

The New York statute involved in this appeal is section 2218 of the Surrogate's Procedure Act of New York (Appendix 1).

ARGUMENT

POINT I

SCPA 2218 as it has been applied by the Courts of New York is an unconstitutional intrusion into the area of foreign policy reserved exclusively to the Federal Government.

Twenty-two years ago, in *Clark* v. *Allen*, 331 U. S. 503, 67 S. Ct. 1431 (1947), the Court upheld the constitutionality of a California statute "defined in general terms of reciprocity." The statute was attacked as "an invasion of the exclusively Federal field of control over foreign relations," but the Court found no intrusion on the face of the statute and concluded that it would have only "some incidental or indirect effect in foreign countries" (*id.* at p. 517).

On January 15, 1968, the Court decided *Zschernig* v. *Miller*, 389 U. S. 429, 88 S. Ct. 664, in which the same attack was made upon an Oregon statute which provides for the escheat of the interests of non-resident aliens in

Oregon estates unless there is full reciprocity for United States citizens and "proof that such foreign heirs . . . may receive the benefit or use or control of money . . . without confiscation." Ore. Rev. Stat. (1965, §111.070 (1)(c)). The California statute upheld by the Supreme Court in *Clark* v. *Allen, supra,* had no benefit, use or control provision.

Based on more than two decades of intervening experience, the Supreme Court concluded that "The Oregon law does, indeed, illustrate the dangers which are involved if each State speaking through its probate courts, is permitted to establish its own foreign policy," and held the Act to be an unconstitutional invasion of the field of foreign policy.

The basis for the decision in *Zschernig* was the manner in which statutes like the Oregon statute and the New York benefit, use and control statute (SCPA 2218) have been applied. The Court said:

> "At the time *Clark* v. *Allen* was decided, the case seemed to involve no more than a routine reading of foreign laws. It now appears that in this reciprocity area under inheritance statutes, the probate courts of various States have launched inquiries into the type of governments that obtain in a particular foreign nation—whether aliens under their law have enforceable rights, whether the so-called 'rights' are merely dispensations turning upon the whim or caprice of government officials, whether the representations of consuls, ambassadors, and other representatives of foreign nations are credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.

"As we read the decisions that followed in the wake of *Clark* v. *Allen*, we find that they radiate some of the attitudes of the 'cold war', where the search is for the 'democracy quotient' of a foreign regime as opposed to the Marxist theory. The Oregon statute introduces the concept of 'confiscation,' which is of course opposed to the Just Compensation Clause of the Fifth Amendment. And this has led into minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should 'not preclude wonderment as to how many may have been denied "the right to receive" . . .' "

* * *

"That kind of state involvement in foreign affairs and international developments—matters which the Constitution entrusts solely to the Federal Government—is not sanctioned by *Clark* v. *Allen*. Yet such forbidden state activity has infected each of the three provisions of §111.070, as applied by Oregon.

"As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata. Yet they of course are matters for the Federal Government, not for local probate courts."

The opinion is equally applicable to SCPA 2218 which is identical with that part of the Oregon act, found unconstitutional by the Court, requiring a showing that foreign heirs will have the benefit, use or control of their awarded funds without confiscation. No doubt with a view to making clear the intended scope of its decision,

the Court extended its discussion to the statutes and decisions of California, Montana, New York and Pennsylvania.

The reference to New York appears in a footnote to the last paragraph quoted above in the *Zschernig* decision, 389 U. S. at 437, 88 S. Ct. at 669, in which the Court said:

> "Such attitudes are not confined to the Oregon courts. Representative samples from the other States would include statements in the New York courts, . . ."

The criteria and attitudes proscribed by the Supreme Court in *Zschernig* have permeated the decisions of the New York courts throughout the entire history and operation of SCPA 2218 and this is as true of the Court of Appeals of New York as it is of intermediate Appellate Courts and the Surrogates Courts.

The application of SCPA 2218 by the New York courts to residents of the "Communist" countries began in 1939. *Estate of Hyman Landau*, 172 Misc. 651, 16 N. Y. S. 2d 3. In that decision, the Court said:

> "It is a matter of common knowledge that private ownership of property has been abolished in the Soviet Union, with the result that none of its nationals there resident is permitted by its laws to have the personal control of any property, which is deemed to belong solely to the State. In other words, there is here presented the precise situation contemplated in the note to the amendment to Section 269 at the time of its enactment, to the remedy of which the law was passed that 'transmission or payment to a beneficiary, legatee or other person resident in a foreign country might be circumvented by confiscation in whole or in part.' So far as Russian nationals are concerned, such confiscation by

> and for the use of the government would be of the fund in its entirety and this is not altered by the indication in a current Congressional inquiry that it would be used by the agencies of the Soviet Government in this country to attempt to undermine our institutions and to sabotage our industries."

Ever since, the New York Court of Appeals, either by affirmative action or in denying leave to appeal from the decisions of lower courts, has adopted for its own, policies found unconstitutional in *Zschernig*. Thus, in the *Matter of Geiger*, 7 N. Y. 2d 109, 195 N. Y. S. 2d 831, 833 (1959), the Court of Appeals of New York said:

> "So long as the distributive shares are properly being withheld by the Surrogate because of the special circumstances in which the beneficiaries find themselves as domiciliaries in an iron-curtain country, they are in no position presently to assign any part of the funds withheld."

This same rationale is to be found in *Matter of Leikind, supra*, decided in June, 1968, six months after this Court's decision in *Zschernig*, in which the Court of Appeals decided that SCPA 2218 is constitutional on its face and that it was unable on the record then before it to find that the statute had been unconstitutionally applied.* However, the Court of Appeals read *Zschernig* as possibly suggesting that in a later case this Court might hold that no statutes such as SCPA 2218 could ever be restricted to a "routine reading" of foreign laws. See footnote at 22 N. Y. 2d 352, 295 N. Y. S. 2d 675.

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* Prior to this decision by the Court of Appeals, the Surrogate of Bronx County, on the basis of this Court's decision in *Zschernig* and its remand of *Goldstein* v. *Cox*, 389 U. S. 581, 88 S. Ct. 694 (1968), held he had no right to pay proceeds belonging to Czechoslovak nationals into court and ordered that the funds be transmitted to them. Estate of Lehotsky, New York Law Journal, Jan. 29, 1968, p. 18.

This observation was prophetic because the New York Courts since *Zschernig* have continued, despite the *Leikind* decision, to apply SCPA 2218 in the manner proscribed by *Zschernig*. See post-*Zschernig* citations, *infra* at p. 19.

In *Matter of Geiger, supra,* the Court of Appeals cited with approval *Matter of Herz' Will,* 7 Misc. 2d 217, 163 N. Y. S. 2d 349, 350 (1957), in which the Surrogate of Nassau County said:

> "No new facts are presented in the papers which should cause this Court to reach a determination differing from that reached *In Re Siegler's Will,* 248 App. Div. 436, 132 N. Y. S. 2d 392 and *Matter of Braier's Estate,* 305 N. Y. 148, 111 N. E. 2d 424. Recent events in Hungary have not been reassuring so as to render it likely that the beneficiaries would have the benefit, use or control of the property in question."

The decision of the Appellate Division, Third Department, *In Re Siegler's Will,* cited with approval by the Court of Appeals in *Herz, supra,* affirmed the decree of the Surrogate's Court, Schoharie County, which directed deposit into Court of legacies belonging to Hungarian nationals on the ground that a certificate from the Envoy Extraordinary and Minister Plenipotentiary of Hungary to the United States, stating that the Hungarian legatee would have the full benefit, use and control of the monies representing their legacies, should not be accepted. The Court said:

> ". . . the controlling issue presented is whether the Surrogate was obliged to accept the certificate of the Hungarian Envoy at its face.
>
> "In normal times we assume that a local court would probably accept the certificate of an envoy to this country from a friendly power as to internal conditions in his country. But these are not normal times."

In *Matter of Greenberg*, 17 N. Y. 2d 417, the Court of Appeals denied leave to appeal from an order refusing transmission of estate benefits to Roumanian nationals. The Surrogate of New York County had ordered the funds deposited with the Director of Finance of the City of New York and, in so doing, had concluded as follows:

> "It must be recognized that, whether or not Roumania imposed restrictions within the meaning of §269-a, it is an Iron Curtain country under Soviet dominance and, for such reasons, facts either as to the operation of Roumanian laws or that country's monetary practices are not available to an inquirer who might be regarded as influenced by capitalist doctrines. It would appear that this was the unfortunate position in which the Attorney-General found himself. The Attorney General was able to offer evidence of certain restrictive provisions of Roumanian law governing the ownership and use of property generally and these restrictions are well recognized as consistent with the communist program of subordinating individual freedom for the material advancement of the communist state." *Matter of Greenberg*, 46 Misc. 2d 883, 261 N. Y. S. 2d 176.*

Upon appeal from the decision of the Surrogate, the Appellate Division, First Department affirmed the order, depositing the funds, stating:

> "The substantial differential between the Roumanian internal rate of exchange applicable to

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* And this, in the face of a letter from the State Department to the Governor of New York requesting the Governor, "In view of the foreign policy aspects of this matter . . .," to bring "to the attention of the appropriate authorities of your State, the Department's conclusion that legatees or distributees living in Roumania have the benefit or use or control of such bequests . . ." Letter of Legal Adviser, State Department, to Governor Rockefeller, dated November 9, 1961, judicially noted by the Surrogate.

> estate distributions received from foreign countries and the external rate of exchange establishes that the distributee 'would not have the benefit or use or control of the money or other property due him' as required by §269-a of the Surrogate's Court Act." *Matter of Greenberg*, 24 A. D. 2d 435, 260 N. Y. S. 2d 818.

At variance with the finding in *Greenberg, supra*, that the existence of foreign exchange regulations justifies the application of SCPA 2218, is the recent decision of the Court of Appeals in a breach of contract action involving Cuban interests, in which it said:

> "This is not an era, surely, in which there is anything novel or internationally reprehensible about even the most stringent regulation of national currencies and the flow of foreign exchange. Such practices have been followed, as the exigencies of international economics have required—and despite resulting losses to individuals—by capitalist countries and communist countries alike, by the United States and its allies as well as by those with whom our country has had profound differences. They are practices which are not even of recent origin but which have been recognized as a normal measure of government for hundreds of years, if not, indeed, as long as currency has been used as the medium of international exchange." *French* v. *Banco Nacional de Cuba*, 23 N. Y. 2d 46, 63, 295 N. Y. S. 2d 433, 449 (1968).

The uninhibited tendency of the New York courts in construing SCPA 2218 to exhibit "cold war" attitudes and to intervene in the internal administration of the laws of certain of the countries of Eastern Europe is evident in many decisions.

Thus, *In Re Shefsick's Estate*, Surrogate, Westchester County, 50 Misc. 2d 293 (1966) 270 N. Y. S. 2d 34, the Court based its decision on the fact that

> "No proof was offered, although required by the Court's prior decision, as to the marketplace rate of exchange; i.e., the rate at which Czech currency could be purchased on the 'black' or 'grey' market or in New York banks . . .
>
> * * *
>
> ". . . the court takes judicial notice that the official rate of exchange of the Czechoslovak crown is an artificial rate, and that this rate, and the rate at which United States dollars may be exchanged through the medium of the Tuzex program, both reflect a substantial over-valuation of the Czechoslovak crown, as related to the dollar; . . ."
>
> * * *
>
> "The added argument that the 'standard crown' is purely a domestic currency that cannot be legally brought into Czechoslovakia, and that the price at which it is procurable in this country has no relevancy to the issues herein, avoids the issue . . ."

Similarly, the Surrogate of Westchester County *In Re Draganoff's Estate*, 46 Misc. 2d 167, 259 N. Y. S. 2d 20 (1965), stated:

> "Courts are not required to work in a vacuum. They are allowed to recognize that while the Communist movement may no longer be monolithic, past actions by the governments of 'Iron Curtain' countries in appropriating foreign inheritances by one means or another do create 'special circumstances [which may] make it appear desirable that such payment should be withheld' (Surrogate's Court Act,

§269-a); and it is such and other actions of governments which motivated the legislature to enact §269-a and its predecessor enactments which have created the uncertainty that the alien non-resident distributees or legatees of an 'Iron Curtain' country will have the benefit or use or control of the funds due them (Matter of Geiger's Estate, 12 Misc. 2d 1043, 1044, 175 N. Y. S. 2d 588, 590 aff'd 7 A. D. 2d 1004. 185 N. Y. S. 2d 227, aff'd 7 N. Y. 2d 109, 112, 195 N. Y. S. 2d 831, 833, 164 N. E. 2d 99, 100; Matter of Geffen's Estate, 199 Misc. 756, 104 N. Y. S. 2d 490; Matter of Getream's Estate, 200 Misc. 543, 544, 107 N. Y. S. 2d 225, 226; Matter of Klein's Estate, 203 Misc. 762, 765-767, 123 N. Y. S. 2d 866, 869-871; Matter of Reidl's Estate, 39 Misc. 2d 805, 807, 242 N. Y. S. 2d 105, 107; Matter of Schmiedl, N. Y. L. J., March 24, 1964, p. 14 col. 3 [not otherwise reported]). This uncertainty does exist in these countries, as opposed to countries such as Great Britain (see Matter of Geffen's Estate, supra), which also has currency controls."

The Court in *Draganoff, supra,* also refused to give credence to the testimony of a distinguished Bulgarian law expert about the laws of his country. In this connection, the Surrogate said:

"The Court cannot disregard the fact that Mr. Stephanov is not a free and independent attorney, an impression he sought to create, but a member of a lawyer's collective (cf. Matter of Mitzkel's Estate, 36 Misc. 2d 671, 675-676, 233 N. Y. S. 2d 519, 523, 524), subject to the restrictive pressures commonly applied in 'iron-curtain' countries. As he was about to return to Bulgaria he could not be expected to say

anything in derogation of his country or its fiscal policies."

Another line of reasoning adopted by the New York Courts is that the inclusion of a country on Circular No. 655, 31 C. F. R. §211,* is presumptive evidence that residents of such countries will not receive the benefit, use or control of their funds. *Matter of Braier,* 305 N. Y. 148, app. dism. sub nom., *Kalmane* v. *Green,* 346 U. S. 802 (1953) 74 S. Ct. 32. To the same effect is *Matter of Marek,* 11 N. Y. 2d 740, 226 N. Y. S. 2d 444 (1962) aff'd 13 A. D. 2d 917 (First Department) 217 N. Y. S. 2d 1010, app. dism. sub. nom *Ioannou* v. *New York,* 371 U. S. 30, 83 S. Ct. 6 (1962).

This view has been adopted by Surrogates throughout the state and remains the basis for establishing a *prima facie* case in support of depositing funds and for requiring a foreign legatee to come forward with evidence relating to the legal, social, economic and political systems of his government. When the laws of the foreign governments are introduced, the Attorney-General of the State or the Public Administrators of the county involved, with the approval of the Court, attacks the credibility of the laws, or of the representatives of the foreign government, examines into the internal administration of these laws and bases his request for a deposit of the funds upon a critique of the legal, economic, political and social systems of the foreign governments whose residents are petitioning to receive their legacies. On frequent occasions the Courts, by judicial notice, or independent investigation, exercises these foreign policy functions on their own.

The cases cited above substantiate the conclusion stated herein. See also:

In re Bold's Estate (1940), Surrogate, New York County, 173 Misc. 545, 18 N. Y. S. 2d 291;

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* Hereinafter referred to as the Treasury List. See Appendix II.

In re Best (1951), Surrogate, New York County, 200 Misc. 332, 107 N. Y. S. 2d 224;
In re Lauraitis' Estate (1954), Kings County, 134 N. Y. S. 2d 907;
Matter of Polubatko (1964), 21 A. D. 2d 735 (Fourth Department), 249 N. Y. S. 2d 929;
Matter of Borok (1966), Surrogate, New York County, 49 Misc. 2d 870, 268 N. Y. S. 2d 669;
Matter of Waessel (1960), Surrogate, Kings County, 27 Misc. 2d 694, 210 N. Y. S. 2d 647;
In re Rysiakiewicz's Will (1952), Surrogate, Queens County, 114 N. Y. S. 2d 504.

There are several reasons why the utilization of the Treasury List violates the principles enunciated in the *Zschernig* decision, *supra*. In the first place, Zschernig involved a legacy to a national of East Germany. That government is on the proscribed list of the Treasury Department, a fact of which the Court was aware, since it was a part of the record on appeal. It made no difference as far as the decision was concerned. Nor could it, since the decision was based upon the fact that matters of foreign policy are for the Federal Government and not the State.

That the inclusion of a foreign government on, or its removal from the Treasury list is a political finding involving our foreign relations has been made clear by the Treasury Department. The Treasury list has been amended from time to time to exclude from its provisions certain countries theretofore placed thereon. These include Poland, Roumania and Bulgaria which were removed on June 7, 1957, April 19, 1960 and August 1, 1963, respectively. The Soviet Union, Lithuania, Latvia and Estonia were removed from the list on June 28, 1968. (See Federal

Register, Vol. 22, No. 130 for July 4, 1968, page 9708). Czechoslovakia was removed from the List on June 20, 1968. (See Federal Register, Vol. 33, No. 123 for June 25, 1968, Pages 9302 and 9303.) Hungary was removed from the List on June 27, 1968. (See Federal Register Vol. 33, No. 120 for July 2, 1968, page 9317.) Each of these 1968 amendments to the Circular No. 655 contains the statement that "the amendment involves a foreign affairs function of the United States".

The State Department has also said as much on frequent occasions in letters to this firm and others. In referring to the Treasury List it has said that "The determinations made by the Secretary of the Treasury under 31 C. F. R. 211.3 apply solely to the Federal law and regulations and not to questions of law or fact concerning remittances of private funds, including inheritances," and that they "may involve considerations not relevant to remittances of private funds or other transactions involving rights of private parties" *.

Originally, in 1940, the Treasury List, which was promulgated under the powers granted to the Secretary of the Treasury by P. L. No. 828, Sec. 5, 54 Stat. 1086, 31 U. S. C. A. §123 (approved Oct. 9, 1940) was an administrative measure. Its purpose was to relieve the Division of Disbursement, Treasury Department, of the responsibility for maintaining supervision over the accumulation of checks, delivery of which had become practically impossible because of war-torn conditions in Europe. See 80th

* On June 13, 1968 nine days prior to the removal of the Soviet Union from the Treasury List, the State Department, in a letter to this firm stated "There are Federal prohibitions (31 C. F. R. 211.3) on the transfer of Federal funds to payees in certain foreign countries, including the Soviet Union. These relate to Federal funds only and involve, in large part, considerations not relevant to remtitances of private funds or other transactions involving the rights of private parties."

Cong. Rec. Sec. 12761-2; Report No. 2177 of Senate Committee of Finance accompanying the Bill. Thus, the countries on the 1941 Treasury List included, among others, Belgium, Denmark, France, Luxemburg and the Netherlands.

With the onset of the cold-war, however, the Treasury List became transformed from an administrative to a foreign policy measure, no longer related to its original purpose of meeting the lack of "postal, transportation, or banking facilities in general or local conditions . . ." in the countries placed on the List. See Treasury Department Circular No. 655, March 19, 1941.

Recently, the United States has candidly acknowledged that the Treasury List " . . . involves a foreign affairs function . . ." See references above, on p. 16 to statements made by Treasury and State Departments.

A striking illustration of the consequence of foreign policy intervention by the New York Courts in the application of SCPA 2218 is the history of the decisions in *Matter of Tybus* and *Matter of Kina, infra.*

In 1961, the Surrogate of Kings County ordered that estate funds belonging to Polish nationals be remitted to them. However, he did so only after making a personal visit to Poland " . . . for an on-the-spot investigation of the situation. In connection therewith, the Surrogate conferred with the Ambassador of the United States to Poland in Warsaw, the Secretary to the Embassy and the American Consul; the members of the Association des Juristes Polanaise; members of the Bar Association of Warsaw, the Director-General of the Ministry of Finance and their counsel; Chiefs of Divisions of the Ministry of Foreign Affairs; Chairman, Officers and Members of the Board of Directors of Bank Polska Kasa Opieki and their

General-Counsel and others." *Matter of Tybus*, 28 Misc. 2d 278, 217 N. Y. S. 2d 913 at 915 (1961).

The point, of course, is that even in applying SCPA 2218 so as to permit the remittance of funds, the Judge was acting like a surrogate of the Secretary of State. The result of the Court's acting in this manner is demonstrated by the fact that five years later (the Surrogate who decided *Matter of Tybus* having died), another Surrogate of Kings County promptly decided in another case involving a Polish national that estate funds should no longer be transmitted to Polish nationals, stating, among other reasons, that "the Court disagrees that the economic conditions arising out of the social and political character of the Government of Poland are not relevant." *Matter of Kina*, 49 Misc. 2d 598, 268 N. Y. S. 2d 131, rev'd. 29 A. D. 2d 563, 286 N. Y. S. 2d 773, aff'd. 23 N. Y. 2d 720.

In *Matter of Kina, supra*, the Court of Appeals affirmed the Appellate Division's reversal of the Surrogate and its finding that the Polish claimant would have the benefit, use and control of his funds but it refused to reach the constitutional question of the lower court's intrusion into foreign affairs although that issue was presented to it and fully briefed. And this was subsequent to *Zschernig* and its own decision in *Leikind, supra*.

The result is that the New York courts continue to apply SCPA 2218 in a manner proscribed by *Zschernig*. See the following cases which are not officially reported:

Estate	*County*	*Index No.*	*Trial Date*
Theodore Haab	Suffolk	176A/60	5/16/68
Antony Daria	Suffolk	103A/50	4/16/68
Mary Polubatko	Monroe	1199/58	5/37/68
Maria Zaggers	Nassau	104409	12/11/68
Ignatz Malchun	Richmond	A 177/63	11/ 5/68
Anton Matisz	Suffolk	341A/47	3/18/69
Jacob Petarsky	Saratoga		10/25/68
Mike Kuzmicz	Cattaraugus		4/29/69
Bruno Seemel	Queens	2282/62	6/23/69
Vlades Kurklietis	Queens	7571/66	6/23/69
Edgar Vitsut	Queens	6263/58	6/23/69

In the oral argument before the three-judge court in *Bjarsch* v. *DiFalco*, *supra*, the Attorney-General of New York took the position that in post-*Zschernig* hearings cited above, the Surrogates engaged in conduct proscribed by Zschernig only because more evidence was introduced by the alien legatees than was required under the standards enunciated by the Court of Appeals in *Leikind* and that the Attorney-General in opposing transmission of the claimants' legacies did no more than cross-examine the claimants' expert witnesses on foreign law matters testified to on direct testimony.

We believe that the Attorney-General's contention is disproved by the records in these cases. However, it should be pointed out that because under Section 3 of SCPA 2218 the burden of proof is upon the alien legatee, he can never be sure what quantum of testimony will

satisfy the Surrogate. And, even when an effort has been made to limit the testimony, the Attorney-General, over objection, has been allowed on cross-examination to go far beyond the direct testimony, upon the theory that what he was doing was testing the expert witness' knowledge of the foreign law. Under the cloak of this theory the Court has permitted testimony regarding the nature and character of the foreign government involved and the integrity of its laws and institutions.*

In an effort to stop repetitive hearings, which in each case consist of the same testimony, we suggested to the Attorney-General, by letter dated September 30, 1968 "that the administration of justice would best be served if your office will now adopt a policy of discontinuing the necessity for further hearings on the issue of benefit, use and control insofar as they involve Soviet citizens and residents who are beneficiaries of New York estates." We pointed out that the result of these unnecessary proceedings "has been that the beneficiaries, the attorneys for the parties and the people of the State of New York have suffered monetary loss and the expenditure of time and man power without justification." Almost four months later, on April 18, 1969, the Attorney-General informed us that he would continue to insist upon hearings "in view of the fact that there are presently several pending litigations in Federal Courts involving the same or like questions. . . ."

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* The Surrogates of New York County, having found that the nationals of Czechoslovakia and the Soviet Union do receive the benefit, use and control of their estate funds, nevertheless so apply S. C. P. A. 2218, as to limit the amount of the initial transmission to $5,000 in cases involving Czechoslovak legatees and $10,000 in cases involving Soviet legatees. See Estates of Chounouzides, De Lowe, Halajko, Kaganoff, New York Law Journal, July 18, 1967, p. 10 and Estate of Szekac, New York Law Journal, June 27, 1966, p. 4. This policy is still in effect.

Finally, on this point, we call the Court's attention to the fact that the New Jersey Supreme Court has found unconstitutional as applied that state's benefit, use and control statute. *Estate of Kish*, 52 N. J. 454, 246 Atl. 2d 1.

The New Jersey statute is patterned after SCPA 2218, except that the latter imposes the burden of proof upon the alien legatee.

In finding the New Jersey benefit, use and control statute unconstitutional as applied, the New Jersey Supreme Court stated as follows:

> "Fiduciaries and the courts, which have authority over them and to which they are accountable, are under an obligation to carry out the direction of the testator or settlor, or the legal direction in the case of intestacy. Implicit in that obligation is the duty to deliver monies belonging to such person in foreign countries, and at the same time to be reasonably sure that the amount, less costs of transmission and exchange into foreign currency, can be transmitted to them through regular international banking channels, consular offices or some other legal and effective means. Although this aspect was not mentioned in *Zschernig*, we think a valid reading of our statute thus also permits withholding and payment into court where there is no present *physical* means of transmitting the payment to a beneficiary in a particular country." (emphasis in original)

We respectfully suggest that the criteria adopted in *Kish* are more consistent with the principles of *Zschernig* than those used by the New York Courts.

POINT II

SCPA 2218 as it has been applied by the Courts of New York violates the due process and equal protection clauses of the Fourteenth Amendment.

For more than a quarter of a century SCPA 2218 has been applied solely to alien legatees who are residents of the "Communist" countries. And, since 1960, when the statute was amended so as to impose upon alien legatees the burden of proving that they will have the benefit, use and control of their funds, this burden has been imposed solely upon the residents of these same countries.

The notes of decisions in McKinney's Laws of New York, Annotated, under SCPA 2218 and its predecessor, Section 269a of the Surrogate's Court Act, confirm that the reported cases in the Surrogates' Courts, Appellate Divisions and the Court of Appeals all involve residents of the Soviet Union, Poland, Czechoslovakia, Bulgaria, Hungary, Roumania, Albania, The German Democratic Republic and The Chinese People's Republic.

The reason given by the New York Courts for so applying SCPA 2218 is the fact that the alien legatees involved are residents of governments having a particular political character and that this of and by itself justifies the application of the statute. See cases cited under Point I. Furthermore, the Attorney-General of New York, either on his own or by order of the Surrogate, appears as a party in these cases for the purpose of opposing transmission of the legacies to residents of the above-named countries. He does not appear for that purpose in cases involving residents of any other countries.

The application of SCPA 2218 in this manner is an arbitrary and invidious discrimination against the residents of these countries.

Prior to 1960, SCPA 2218 (then known as Section 269 of the Surrogate's Court Act) did not, on its face, discriminate between citizens and aliens. In 1960, however, the statute was amended so as to impose upon alien legatees the burden of proving that they would have the benefit, use and control of their funds. Section 269-a of the Surrogate's Court Act, Added by L. 1960.

It may well be that we have reached the point in our constitutional development where an arbitrary distinction between citizens and aliens in the right to inherit is violative of the Fourteenth Amendment. In this connection, we note that in *Clark* v. *Allen, supra,* the Court observed that issues under the Fourteenth Amendment were not raised in that case.

But, even assuming, *arguendo,* that there is a substantial reason for discriminating against aliens in the right to inherit, once a State has determined, as has New York, that this right shall be the same for aliens as for citizens, it cannot, without violating their rights under the Fourteenth Amendment, impose unequal burdens upon aliens in the securing of these rights. The burden of proof imposed upon aliens by SCPA 2218 is such an unfair and illegal burden. See *Oyama* v. *State of California,* 332 U. S. 633, 68 S. Ct. 269 (1948).

Furthermore, SCPA 2218 has been applied so as to discriminate exclusively against one group of aliens as against all other aliens solely upon the ground that the aliens discriminated against are residents of "Communist" countries. And this is so whether or not the

alien's government is on the Treasury List. Discrimination based solely upon the political character of the government of which the alien is a resident is akin to the sort of discrimination struck down by this Court which was based solely upon a person's country of origin. *Oyama* v. *State of California, supra, Torao Takahashi* v. *Fish and Game Commission,* 334 U. S. 410, 68 S. Ct. 1138 (1948). For a statutory classification to satisfy the requirements of the Equal Protection Clause, it must be related to some proper governmental purpose, *Truax* v. *Raich,* 239 U. S. 33, 36 S. Ct. 7; *Schnieder* v. *Rusk,* 377 U. S. 163, 84 S. Ct. 1187 (1964). Discrimination of the character here involved against aliens qua aliens cannot be a proper state governmental purpose. See *Hines* v. *Davidowitz,* 312 U. S. 52, 61 S. Ct. 399 (1941).

That non-resident aliens are entitled to due process was established by this Court in *Russian Volunteer Fleet* v. *U. S.,* 282 U. S. 481, 51 S. Ct. 229 (1939) and *U. S.* v. *Pink,* 315 U. S. 203, 62 S. Ct. 552.

We believe that for the same reasons non-resident aliens are entitled to equal protection under the Fourteenth Amendment, particularly in a situation in which the alien is seeking to enforce his rights to property within one of the states of the United States. *Yickwo* v. *Hopkins,* 118 U. S. 356, 6 S. Ct., 1064. See *Sardino* v. *Federal Reserve Bank of New York,* 361 F. 2d 106, 111 (1966). U. S. C. A. 2d, in which that Court said:

> "The government's second answer that the Constitution of the United States confers no rights on non-resident aliens is so patently erroneous in a case involving property in the United States that we are surprised it was made. Throughout our history, the guarantees of the constitution have

> been considered applicable to all actions of the government within our borders—and even to some without . . . "

In any event, the Fourteenth Amendment like the Fifth Amendment forbids the discrimination that is so unjust as to be a violation of due process. *Schnieder* v. *Rusk*, 377 U. S. 163, 84 S. Ct. 1187.

As this Court said in *Bolling* v. *Sharpe*, 347 U. S. 497 74 S. Ct. 693:

> "But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

Commenting upon the right to due process enjoyed by non-resident aliens, the United States Court of Appeals for the Second Circuit in *Sardino* v. *Federal Reserve Bank*, *supra*, made an observation which is peculiarly applicable to the situation which has faced alien legatees who have been adversely affected by the application against them of SCPA 2218.

> " . . . The due process clause speaks in terms not of taking but of deprivation; we find it hard to say there is no deprivation when a man is prevented both from obtaining his property and from realizing any benefit from it for a period of indefinite duration which may outrun his life. Compare Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 415, 43 S. Ct.

158, 67 L. Ed. 322 (1922); Goldblatt v. Town of Hempstead, 369 U. S. 590, 952-954, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962); ALI, Restatements of Foreign Relations Law §197 (Proposed Official Draft 1962). [Sardino v. Federal Reserve Bank of New York, 361, F. 2d 106 (1966) at p. 111]"

POINT III

SCPA 2218 is unconstitutional on its face because it intrudes illegally into the area of foreign relations.

Whether SCPA 2218 is constitutional on its face must be determined from a reading of the purpose of the statute as enunciated by the Legislature of New York. At the time Section 269 of the Surrogate's Court Act (the predecessor of SCPA 2218) was enacted, there was included in the New York legislative bill, an explanatory note which reads as follows:

> "This amendment is proposed by the Executive Committee of the Surrogate's Association of the State of New York. The purpose of the amendment is to authorize the deposit of monies or property in the Surrogate's Court in cases where transmission of payment to a beneficiary, legatee, or other person resident in a foreign country might be circumvented by compensation in whole or in part. The amendment authorizes the impounding of the fund by the Surrogate to await the time when payment can be made to the beneficiary for his own benefit, use and control." Cited in *Matter of Braier, supra.*

We suggest that the very genesis of SCPA 2218 is proof of its unconstitutionality and that it cannot be applied

without involving the New York courts "in an evaluation, either expressed or implied, of the administration of foreign law, the credibility of foreign diplomatic agents and the policies of foreign governments". See the concurring opinion in *Zschernig* of Mr. Justice Stewart with whom Mr. Justice Brennan joined.

This is particularly true since in 1960, the statute was amended to include a requirement imposing upon *alien* legatees the burden of proving that they will receive the benefit, use or control of the benefits due them. See Section 3 of SCPA 2218, *supra*. We understand that to be the thrust of that part of the decision of the New Jersey Supreme Court in *Matter of Kish, supra,* which, in dealing with the subject of burden of proof, said:

> "We are further of the opinion, *in view of the rationale of Zschernig* as well as the essentially negative language of our statute, that the burden should rest on the party seeking the withholding of distribution . . ." (emphasis supplied).

Twenty-five years of experience, including the past 19 years during which the burden of proof has been statutorily imposed upon alien legatees, indicates that a statute like SCPA 2218 cannot be applied without intervening in foreign affairs. As we have pointed out, the nature of the hearings before Surrogates since the *Zschernig* decision are not substantially different than those which were conducted prior to *Zschernig*. What quantum of proof is an alien legatee claimant required to produce to meet the burden of proof? If his expert witness testifies that there are no laws in his country which prohibit receipt of his legacy, the Attorney-General or the Public Administrator will either ask about "secret laws" or raise questions about the distinction between ownership rights under a social system different than ours, or he

will, under the guise of testing the expert witness' knowledge, raise the most fundamental questions about the credibility of the laws and institutions of the alien legatee's government.

The same sort of hearing will take place if the alien legatee's expert witness testifies as to the existence of laws in the alien's country guaranteeing the right to inherit and own property.

In Philadelphia, the Orphan's Court *en banc* struck down Pennsylvania's benefit, use and control statute as unconstitutional on the basis of this Court's decision in *Zschernig. Estate of Struchmanczuk,* 44 D. C. 2d 155. No appeal from the decision of that six-judge court was taken by the Attorney-General of Pennsylvania.

POINT IV

SCPA 2218 is unconstitutional on its face because it violates the due process and equal protection clauses of the Fourteenth Amendment.

The language of section 269 of the Surrogate's Court Act, the original predecessor statute of SCPA 2218, contained no reference to "alien" legatees.*

However, in 1960, the statute was amended by the addition of a section which imposed upon "alien" legatees the burden of proving that they would have the benefit, use and control of their legacies in the circumstances described by the statute. Section 269-a of the Surrogate's Court Act. Added by L. 1960, ch. 975. The burden of proof requirement is now Section 3 of SCPA 2218.

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* But the legislative note included in the proposed bill stated that its purpose was to authorize the deposit of monies belonging "to a beneficiary, legatee or other person resident in a foreign country" when the transmission "might be circumvented by confiscation in whole or in part." *Supra,* at p. 26.

Such discrimination against aliens qua aliens violates the due process and equal protection provision of the Fourteenth Amendment. See *American Commuters Assn.* v. *Levitt*, 279 Fed. Supp. 40; *Robertson* v. *Ott*, 284 Fed. Supp. 735. Even the Anti-Alien Land Law decisions of this Court upholding the right of a state to discriminate against aliens with respect to their right to own land, dealt with statutes which discriminated against certain kinds of aliens such as those not eligible for citizenship or who had not declared their intention to become citizens.* And, surely, these decisions have lost much, if not all, of their vitiality. See *Oyama* v. *State of California* and *Torao Takahashi* v. *Fish and Game Commission, supra.*

At the least, the *Oyama* case would seem to stand for the proposition that when an unequal burden of proof is imposed upon an alien to enforce a property right which the state has given to all persons regardless of citizenship or alienage, the requirement violates the alien's Fourteenth Amendment rights. The State of New York does not discriminate between aliens and citizens with respect to the right to inherit. Having granted this right equally, it cannot place obstacles in the way of the alien's ability to enforce these rights which it does not place in the way of citizens.

It may not be too much to suggest that we have reached the point where no discrimination should be countenanced against aliens and in the right to inherit except insofar as the Federal government may feel it is necessary as part of the conduct of foreign relations, e.g. Trading with the Enemy Act, 50 App. USCA §5. See *Hines* v. *Davidowitz, supra.*

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* *Terrace* v. *Thompson*, 263 U. S. 197, 44 S. Ct. 15; *Porterfield* v. *Webb*, 263 U. S. 225, 44 S. Ct. 21; *Webb* v. *O'Brien*, 263 U. S. 313, 44 S. Ct. 112; *Frick* v. *Webb*, 263 U. S. 326, 44 S. Ct. 115; *Cockrill* v. *California*, 268 U. S. 258, 45 S. Ct. 490.

CONCLUSION

For the reasons stated above, we respectfully contend that SCPA 2218 is unconstitutional on its face and as it has been applied by the State of New York.

Respectfully submitted,

WOLF POPPER ROSS WOLF & JONES
Amicus Curiae

MARTIN POPPER
Of Counsel

APPENDIX I

Section 2218 of the Surrogate's Court Procedure Act of New York

"Section 2218. Deposit in Court for Benefit of legatee, distributee or beneficiary.

"1. (a) Where it shall appear that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such alien would otherwise be entitled shall be paid into court for the benefit of said alien or the person or persons who thereafter may appear to be entitled thereto. The money or property so paid into court shall be paid out only upon order of the surrogate or pursuant to the order or judgment of a court of competent jurisdiction.

"(b) Any assignment of a fund which is required to be deposited pursuant to the provisions of paragraph one (a) of this section shall not be effective to confer upon the assignee any greater right to the delivery of the fund than the assignor would otherwise enjoy.

"2. Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person

or persons who may thereafter appear entitled thereto. The money or property so paid into court shall be paid out only upon order of the court or pursuant to the order or judgment of a court of competent jurisdiction.

"3. In any such proceeding where it is uncertain that an alien beneficiary or fiduciary not residing within the United States, the District of Columbia, the Commonwealth of Puerto Rico or a territory or possession of the United States would have the benefit or use or control of the money or property due him the burden of proving that the alien beneficiary will receive the benefit or use or control of the money or property due him shall be upon him or the person claiming from, through or under him."

APPENDIX II

Treasury List—As Amended June 28, 1968

Federal Register, Vol. 33, No. 130—Thursday, July 4, 1968

Title 31—Money and Finance: Treasury

Chapter II—Fiscal Service, Department of the Treasury
Subchapter A—Bureau of Accounts

[Dept. Circular No. 655, 4th Amdt.]

Part 211—Delivery of Checks and Warrants to Addresses Outside the United States, Its Territories and Possessions

Withholding of Delivery of Checks

On the basis of information available to the Secretary of the Treasury, including advice received from the Department of State, the Secretary has determined that postal, transportation and banking facilities in general, and local conditions in Estonia, Latvia, Lithuania, and the Union of Soviet Socialist Republics are such that there is a reasonable assurance that the payee of a check or warrant drawn against funds of the United States, or any agency or instrumentality thereof, will actually receive such a check or warrant and be able to negotiate it for full value. The Treasury Department therefore finds it necessary to amend its regulations at 31 CFR Part 211 (Treasury Department Circular No. 655, as amended) so as to delete those countries from the list of restricted areas in §211.2(a) to which such a check or warrant may not be sent from the United States for delivery. The Department also finds, in accord with 5 U. S. C. 553, that notice and public procedure thereon are not necessary since the amendment involves a foreign affairs function of the United States.

Accordingly, §211.2(a), Subchapter A, Chapter II of Title 31 of the Code of Federal Regulations is amended to read as follows:

§211.2 Withholding of delivery of checks.

(a) It is hereby determined that postal, transportation, or banking facilities in general or local conditions in Albania, Communist-controlled China, Cuba, North Korea, North Viet-Nam, the Russian Zone of Occupation of Germany, and the Russian Section of Occupation of Berlin, Germany, are such that there is not a reasonable assurance that a payee in those areas will actually receive checks or warrants drawn against funds of the United States, or agencies or instrumentalities thereof, and be able to negotiate the same for full value.

• • • •

(Sec. 5, 54 Stat. 1087; 31 U. S. C. 127)

Effective date. This amendment shall become effective upon signature.

Dated: June 28, 1968.

[SEAL]

JOHN K. CARLOCK,
Fiscal Assistant Secretary.

[F.R. Doc. 68-7994; Filed July 3, 1968; 8:50 a.m.]